

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
JUL 21 2008
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [Signature]
DEPUTY CLERK

EMERSON GAITAN FABIAN, ET
AL.,
Plaintiff,

v.

MAUREEN DUNN, ET AL.,
Defendant.

No. SA-08-CA-0269-RF

**ORDER DENYING MOTION TO DISMISS WITHOUT PREJUDICE TO RE-
FILE**

BEFORE THE COURT are Defendants' Motion to Dismiss Plaintiff's Original Complaint, or alternatively, Motion for a More Definite Statement (Docket No. 10); Plaintiffs' Response (Docket No. 16); Defendants' Reply (Docket No. 22); and Plaintiffs' Sur-reply (Docket No. 50). Plaintiffs filed their First Amended Complaint on June 26, 2008, after Defendants' had filed the instant Motion. It has come to the Court's attention that Plaintiffs seek leave to further amend their pleadings. *See* Docket No. 50 at 2. On July 15, 2008, the Court granted Defendants' Agreed Motion for Enlargement of Time and to Establish a Consolidated Response and Briefing Schedule. *See* Docket No. 47. That Order states that Defendants shall file answers and/or dispositive motions within thirty days after Plaintiffs file their Second Amended Complaint. Plaintiffs intend to file a Second Amended Complaint in the coming weeks, after exhausting their administrative remedies with the

federal government, and also intend to add additional claims. Plaintiffs seek leave to further amend and clarify the existing claims. *See* Docket No. 50.

As such, the Court is of the opinion that it is premature to rule on the pending Motion to Dismiss at this time. Therefore, the Court will deny without prejudice to re-file the pending Motion to Dismiss. The Court's decision to deny the Motion has nothing to do with the merits of the Motion; rather, the Court seeks to work off of active pleadings. After Plaintiffs file their Second Amended Complaint, and pursuant to the schedule outlined in the Agreed Motion for Enlargement of Time and to Establish a Consolidated Response and Briefing Schedule, Defendants may re-urge their Motion. Furthermore, in light of the Court's ruling today, the hearing on the Motion to Dismiss, currently scheduled for July 30, 2008, will be cancelled. Once the Court receives the briefing and responses after Plaintiffs amend their pleadings, the Court will reschedule the hearing.

In accordance with the Court's ruling, Defendants' Motion to Dismiss Plaintiffs' Original Complaint, or alternatively, Motion for a More Definite Statement (Docket No. 10) is DENIED WITHOUT PREJUDICE to re-file after Plaintiffs file their Second Amended Complaint.

It is so ORDERED.

Signed this 21st day of July, 2008.



ROYAL FURGESON
UNITED STATES DISTRICT JUDGE